STATE OF MICHIGAN

COURT OF APPEALS

ROSLYN DAVIS,

Plaintiff-Appellant,

v

BARTON-MALOW COMPANY, GENERAL MOTORS CORPORATION, and ETKIN EQUITIES, INC.,

Defendant/Third-Party Plaintiffs-Appellees,

and

PINKERTON SECURITY & INVESTIGATION SERVICES, a/k/a PINKERTON, INC.,

Third-Party Defendant,

and

AMERICAN AUTOMATIC FIRE PROTECTION, a/k/a VIPOND FIRE PROTECTION OF CANADA, and LIMBACH COMPANY,

Third-Party Defendants-Appellees.

UNPUBLISHED
June 1, 2001

No. 219643
Oakland Circuit Court
LC No. 97-001549-NO

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition of plaintiff's personal injury action in favor of defendants-appellees Barton-Malow Company ("Barton"), General Motors Corporation ("GM") and Etkin Equities, Inc. ("Etkin") (hereinafter collectively referred to as "defendants"), pursuant to MCR 2.116(C)(10). We affirm.

I

Plaintiff was a security guard at defendants' TCP East construction site.[1] She was injured when she attempted to step over two metal beams[2] which were lying across an area that later became a sidewalk. Plaintiff's right foot cleared the beams but her left foot became trapped between the beams. Plaintiff stated in her deposition that she had parked her car in front of the beams and had done so numerous times prior to the accident. Plaintiff had previously walked around or stepped over the fully exposed beams without incident. She also stated that no other construction material was present in the area where she fell.

Plaintiff commenced this action against defendants, alleging that they had breached their duty to keep the site reasonably safe and to guard against unreasonable risks to workers at the site. Defendants subsequently brought a third-party action against Automatic Fire Protection ("AAFR") and Limbach Company ("Limbach"), alleging that those entities were responsible for the beams over which plaintiff allegedly tripped, and also against plaintiff's employer, Pinkerton, alleging theories of common law indemnity, implied contractual indemnity, express contractual indemnity and restitution for breach of contract.

Following a hearing, the trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), based on the open and obvious doctrine. After plaintiff filed a motion for reconsideration, the trial court affirmed its earlier decision, but did so on a different ground. The court concluded that, even if the duty imposed on a general contractor is different from the general duty of care imposed on a landowner, see *Hughes v PMG Building Inc*, 227 Mich App 1; 574 NW2d 691(1997), summary disposition was still appropriate because the undisputed facts revealed that the condition in question did not create a high degree of risk to a significant number of workers.[3] See also *Funk v General Motors*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds in *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

II

On appeal, plaintiff argues that the trial court erred when it initially granted summary disposition to defendant Barton, a general contractor, based on the open and obvious danger doctrine applicable to landowners in general. However, because the trial court subsequently recognized on reconsideration that the duty of care owed by a general contractor is distinct from the general duty of care owed by a landowner, and because we agree that the trial court properly granted summary disposition on the basis of this distinct duty, *Hughes supra* at 4, further review of this issue is unnecessary.

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[1] GM, the owner of the property, contracted with Etkin to serve as the development agent with regard to the construction project and Etkin, in turn, contracted with Barton to act as the construction manager for the project.

[2] The metal beams are alternatively referred to as pipes or poles in the record.

[3] The court also dismissed defendants' third-party complaint, without prejudice, and indicated that the action could be reinstated in the event plaintiff's action was subsequently reinstated.

III

Plaintiff challenges the trial court's decision to grant summary disposition under the theory of a common work area as it relates to the scope of a general contractor's duty of care at a worksite. This Court reviews summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Hughes, supra* at 4. In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether a factual question exists which is material to the disposition of the action. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Ordinarily, a general contractor is not liable for a subcontractor's negligence. *Hughes, supra* at 5, citing *Signs v Detroit Edison Co*, 93 Mich App 626, 632; 287 NW2d 292 (1979). A general contractor may be liable for worksite injuries if it fails to take "reasonable steps within its supervisory and coordinating authority" to guard against "readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." *Funk, supra* at 104; *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999). To be liable, there must be: (1) a general contractor with supervisory and coordinating authority over the job site, (2) a common work area shared by the employees of several subcontractors, (3) a readily observable, avoidable danger in that work area (4) that creates a high degree of risk to a significant number of workers. *Groncki v Detroit Edison Co*, 453 Mich 644, 662, 557 NW2d 289 (1996) (Brickley, C.J.); *Funk, supra* at 104; *Hughes, supra* at 6.

We conclude that the submitted evidence fails to establish a duty on the part of Barton under the theory of common work area.[4] Plaintiff failed to show that the specific condition in question posed a "high degree of risk to a significant number of workmen." We note that this is a separate element from simply finding that the risk occurred in a common area of the construction site. *Candelaria, supra* at 73-74; *Hughes, supra* at 6. Although plaintiff argues that the "degree of risk" pertains only to the likelihood of injury, rather than to the severity of any possible resulting harm, our reading of *Funk* and its progeny lead us to disagree.

In discussing the "high degree of risk factor," the Court in *Funk* stated:

> Mishaps and falls are likely occurrences in the course of a construction project. To completely avoid their occurrence is an almost impossible task. However, relatively safe working conditions may still be provided by

[4] We note that in her brief on appeal, plaintiff cites the deposition testimony of Joanne Sauer, the project engineer for Barton. In plaintiff's response to defendant's motion for summary disposition, plaintiff did not rely upon Sauer's deposition testimony. Further, on appeal plaintiff refers to portions of her deposition testimony and the deposition testimony of Gary Shear which were not presented to the trial court. This Court is limited to reviewing the record presented to the lower court. MCR 7.210(A); *Long v Chelsea Community Hosp*, 219 Mich App 578, 588; 557 NW2d 157 (1996).

> implementing reasonable safety measures to prevent mishaps from causing *aggravated injuries* such as those suffered by Funk. [*Funk, supra* at 102-103 (emphasis added).][5]

The proposition that a "high degree of risk" involves a risk of harm that is somewhat out of the ordinary, and would entail something more than a common occurrence involving someone tripping over construction materials, is supported by subsequent cases discussing the retained control doctrine. *Groncki, supra* at 664 (liability for electrocution of workman who was delivering masonry supplies by contact with uninsulated power lines); *Plummer v Bechtel Constr Co*, 440 Mich 646, 653-654; 489 NW2d 66 (1992) (injury sustained from falling twenty feet from a catwalk, striking a steel girder and then falling ten more feet onto a work shed); *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 405; 516 NW2d 502 (1994) (decedent pinned by seven ton steel truss and cut in half).

In light of plaintiff's deposition testimony, we do not believe that the metal beams created "a high degree of risk to a significant number of workers." Plaintiff admits that the beams over which she tripped were visible and that she was aware of their location and existence. Additionally, although plaintiff maintains that she was required to negotiate her way around the beams to complete her rounds, she also testified that she had walked over the beams at least once and around the beams twice on the day of her accident, thus indicating that the beams were navigable and avoidable. Under the circumstances, we conclude that the risk of injury here, that of tripping over building materials on the ground at a construction site, did not constitute the requisite "high degree of risk" to impose liability.

For these reasons, we conclude that the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

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[5] As a related matter, plaintiff's attempt to equate the factual situation here with that in *Funk, supra*, is misguided. Plaintiff alleges that the defendant's conduct created a "high degree of risk," because a similar "slip and fall" was considered to create such a risk in *Funk*. In *Funk*, however, the plaintiff slipped and fell through a hole in the roof, falling thirty feet to the ground. *Funk, supra* at 100.